

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of Steve Sviggum,
Commissioner, Department of Labor
and Industry,

**DECISION AND ORDER FOR
DEFAULT JUDGMENT**

Complainant,

vs.

S & S Exterior Specialists, LLC,

Respondent.

This matter came on before Administrative Law Judge (ALJ) Kathleen D. Sheehy for telephone prehearing conferences on September 30, 2010, and October 18, 2010.

Jackson Evans, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, appeared for the Department of Labor and Industry (Department). S & S Exterior Specialists, LLC, did not participate in either telephone conference, nor did Respondent contact the Administrative Law Judge to make other arrangements or request that the conferences be rescheduled.

Based on all the files, records, and proceedings, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that the contested citation and notification of penalty against Respondent are affirmed, and default judgment in favor of the Department is granted.

Dated: October 27, 2010

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3 (2008),¹ this Order is the final decision in this case. Under Minn. Stat. §§ 182.661, subd. 3, and 182.664, subd. 5, the employer, employee or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.

MEMORANDUM

Respondent is an employer as defined by Minn. Stat. § 182.651, subd. 6, engaged in the business of installing siding. On February 20, 2009, the Department conducted an occupational safety and health inspection of Respondent's work site at 785 Keller Parkway, Little Canada, Minnesota, in accordance with Minn. Stat. § 182.659. As a result of the inspection, the Department found that Respondent had failed to comply with three OSHA standards: an employee was exposed to fall hazards in excess of ten feet while working from a ladder jack scaffold without the use of fall protection, in violation of 29 C.F.R. § 1926.451(g)(1); an employee was exposed to fall hazards of approximately 18 feet while working on the top step of a folded step ladder placed on a deck, in violation of 29 C.F.R. § 1926.1053(b)(4); and an employee was using the top step of a step ladder as a step, in violation of 29 C.F.R. § 1926.1053(b)(13). On March 19, 2009, the Commissioner issued Citations and Notifications of Penalty in the amount of \$1,875 against Respondent for these violations. The citation informed Respondent of its right to a hearing to contest the violations in the citation by filing a Notice of Contest with the Commissioner within 20 calendar days of receiving the citation.

On April 8, 2009, the Respondent filed a Notice of Contest challenging the citations and penalties.²

On July 30, 2009, the Department served a Summons and Complaint on the Respondent by mail.³ The Summons informed Respondent that he was required to serve an Answer to the Complaint on the Commissioner within 20 days after service of the Summons.⁴ Respondent was also informed that his failure to file an Answer might constitute a waiver of Respondent's right to further participate in this proceeding. Respondent did not file an Answer to the Complaint.

On September 2, 2010, the Department served a Notice and Order for Hearing and Prehearing Conference on the Respondent by mail.⁵ The Notice and Order for Hearing and Prehearing Conference scheduled a telephone conference to be held at 1:30 p.m. on September 30, 2010. The Notice and Order for Hearing also provided, at

¹ All references to Minnesota Statutes are to the 2008 edition; all references to Minnesota Rules are to the 2009 edition.

² Notice of Contest (received April 8, 2009).

³ Affidavit of Service by Mail (July 30, 2009).

⁴ See Minn. Stat. § 182.661, subd. 6.

⁵ Certificate of Service (Sept. 2, 2010).

page 2, that the Respondent's failure to appear at the hearing may result in a finding that the Respondent is in default, that the allegations contained in the Notice and Order may be accepted as true, and that the proposed action may be upheld.

On September 30, 2010, the Administrative Law Judge unsuccessfully attempted to reach the Respondent by telephone and left a message on his voicemail to contact her as soon as possible. The prehearing conference was continued to 1:30 p.m. on October 18, 2010, and the Respondent was provided with a telephone number to use for the conference. In the letter rescheduling the prehearing conference, the Administrative Law Judge advised the Respondent that failure to appear for the prehearing conference may result in a finding that the Respondent is in default; that the allegations made by the Complainant may be accepted as true; and that the Complainant's proposed action may be upheld.⁶ On October 18, 2010, the Respondent did not appear for the rescheduled prehearing conference or contact the Administrative Law Judge to make other arrangements.

Under the rules of the Department of Labor and Industry, a respondent's failure to deny the allegations in the Complaint is deemed to be an admission, and any affirmative defense not asserted is deemed to be waived.⁷ Under the rules of the Office of Administrative Hearings, a respondent's failure to appear at a prehearing conference without the prior consent of the judge is a default, upon which the allegations set out in the notice and order for hearing may be deemed proved without further evidence.⁸

Respondent has not filed an answer and has failed to appear for two prehearing conferences. Accordingly, the allegations contained in the Complaint are deemed to be true, and any affirmative defenses are deemed waived pursuant to Minn. R. 5210.0570, subp. 4, and Minn. R. 1400.6000.

The Respondent violated 29 C.F.R. § 1926.451(g)(1), as described in Citation 1, Item 1; 29 C.F.R. § 1926.1053(b)(4), as described in Citation 1, Item 2a; and 29 C.F.R. § 1926.1053(b)(13), as described in Citation 1, Item 2b. These violations were properly classified as serious violations under Minn. Stat. § 182.651, subd. 12; and the proposed penalty was issued properly pursuant to Minn. Stat. § 182.661, subd. 1. The amount of the penalty is appropriate and reflects consideration of the employer's size, the employer's good faith, the employer's violation history, and the gravity of the violation alleged, as required by Minn. Stat. § 182.666, subd. 6. The contested citation and notification of penalty are affirmed.

K.D.S.

⁶ Letter to parties from ALJ (Oct. 5, 2010).

⁷ Minn. R. 5210.0570, subp. 4 (2009).

⁸ Minn. R. 1400.6000.